BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6374 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

ARTIE NEWTON
(Claimant-Appellant)

S.S.A. No.

SANDBERG FURNITURE COMPANY
(Employer)

Account No.

Referee's Decision No. LA-11784

PRECEDENT
BENEFIT DECISION
No. P-B-186

FORMERLY
BENEFIT DECISION
No. 6374

STATEMENT OF FACTS

The claimant had been employed as a janitor by this employer for nearly seven years on an hourly basis from 7:00 a.m. until 3:30 p.m. One of his duties was to burn scrap lumber and sawdust in an incinerator.

Although the claimant's hourly pay did not begin until 7:00 a.m. of each working day, the employer nevertheless expected him to report for duty early enough so that he could be at the incinerator when the 7 o'clock whistle blew. This incinerator was about a 2 or 3-minute walk from the time clock. On more than one occasion, the claimant did not get to his work station by the time the morning whistle blew; and he had been warned that future infraction of the rule would lead to his discharge.

On April 6, 1955, as the claimant was on his way to the incinerator and less than 10 to 15 yards away from it, the 7 o'clock whistle blew; the claimant was discharged for not being at his work station on time.

The claimant's first duty in the morning was to start the incinerator. It required 20 to 30 minutes to hand load the incinerator, after which it was fired and sawdust then fed into it automatically. There was no evidence that the claimant's actions had in any way interfered with the employer's operations.

The claimant's employer had a contract with the claimant's union which provided that employees would be paid on an hourly basis; such contract also contained a grievance clause; and, at the time of the referee's hearing, a request was pending to arbitrate the question of the claimant's discharge.

On April 25, 1955, the Department of Employment issued a determination under Section 1256 of the Unemployment Insurance Code and a ruling under Section 1030 of the code holding that the claimant had been discharged for misconduct in connection with his most recent work. On April 28, 1955, the claimant appealed to a referee from such determination and ruling. On June 10, 1955, the claimant appealed to the Appeals Board from the referee's decision which affirmed the department's determination.

The issue to be decided in this appeal is whether the claimant was discharged for misconduct.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides as follows:

> "1256. An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work.
>
> "An individual is presumed to have been discharged for reasons other than misconduct in connection with his work and not to have

voluntarily left his work without good cause unless his employer has given written notice to the contrary to the director within five days after the termination of service, setting forth facts sufficient to overcome the presumption. If the employer files such notice, the question shall immediately be determined in the same manner as benefit claims."

In Boynton Cab Company v. Neubeck (237 Wis. 249; 269 NW 636), the Wisconsin Supreme Court defined what constitutes misconduct; and this board has frequently cited this definition with approval (Benefit Decisions Nos. 4648, 5376, and 5509). In the Boynton case, the court said:

"The term 'misconduct' . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgement or discretion are not to be deemed 'misconduct' within the meaning of this statute." (Emphasis added)

In Benefit Decision No. 4685, we considered a case in which the claimant was discharged for tardiness and held:

"Appeals involving the application of Section 58(a)(2) of the Act have been before us in prior cases, and we have held that in order to constitute misconduct within the meaning of this section, the

> claimant must have materially breached a duty owed the employer under the contract of employment, which breach tends substantially to injure the employer's interests. Consonant with this principle, a discharge resulting from a violation of a company rule is not, in itself, misconduct which results in disqualification from benefits under Section 58(a)(2) of the Act. Although repeated tardiness under some circumstances may be held to constitute misconduct connected with an individual's work, considering all of the facts before us in their entirety, we cannot find that the claimant's course of conduct which resulted in his discharge was so unreasonable as to be misconduct within the meaning of the Act. On the day he was discharged the claimant was only four minutes late and for what to us appears to have been a compelling reason. Admittedly, the employer's operations were not affected by his tardiness. He had been a few minutes late for work on prior occasions but as far as the record disclosed with reasonable justification. Certainly, there was no evidence of any wilful disregard of the employer's interests on the part of the claimant considering that under the company rules he was penalized for each tardiness by deductions from his pay."

Although the claimant in the case now before us did not have any justification for his tardiness, we look beyond that element to determine whether the claimant's entire "course of conduct which resulted in his discharge was so unreasonable as to be misconduct."

In Benefit Decision No. 5717 we again considered a discharge for tardiness and held as follows:

> "However, such is not the case in the instant appeal. It was the company's policy that the employee be at his work station at starting time. The employer did not make an exception to this policy in the case of the claimant. It required approximately one minute and forty-five seconds to go from the

time clock to the press where the claimant worked. The clock punched the mintue through fifty-nine seconds of the minute. It follows, therefore, that the claimant was late and in violation of the policy of the employer on those occasions when he punched in one minute to the starting time or after then. This occurred on sixty-four occasions in the course of the claimant's seven months of employment with the employer herein. There were forty-seven times when the claimant punched in after the starting hour. The claimant was in charge of a press with a crew of three men and his presence was necessary to prepare the inks and rollers before the presses could be started. The claimant was warned on two occasions that he must be at work on time. The claimant was tardy in relation to the company policy seven times following the second warning. In our opinion, the claimant's conduct showed a substantial disregard for the employer's interest so as to amount to misconduct. We hold, therefore, that the claimant is subject to disqualification for benefits for the five-week period commencing January 23, 1950 (Benefit Decision No. 4828-BR-88)."

In Benefit Decision No. 6357, we upheld a discharge for misconduct where the claimant was habitually late because she did not like her job.

In our opinion, the last two decisions are distinguishable on their facts from the case at hand.

From the evidence before us, we find that, if there was any dereliction of duty on the part of the claimant, it was of such minor consequence that it did not constitute misconduct.

DECISION

The decision and ruling of the referee are reversed. Claimant is not disqualified to receive benefits under Section 1256 of the code. Benefits are

payable provided the claimant is otherwise eligible. Any benefits paid to the claimant are chargeable to Employer Account No. 011-8715.

Sacramento, California, October 27, 1955.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

ARNOLD L. MORSE

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 6374 is hereby designated as Precedent Decision No. P-B-186.

Sacramento, California, January 27, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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